91-1020

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MASON H. ROSE,

Petitioner,

v.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. If a federal default judgment was void when entered, for lack of personal jurisdiction:

(a) Was that voidness retroactively waived by a postjudgment general appearance in the federal court, by filing a Rule 60 motion asking for relief on the merits?

(b) Does a holding of retroactive waiver violate due process?

2. If a federal Court of Appeals dismisses an appeal as moot, but refuses to vacate the judgment or order appealed from (or vacates it nonretroactively) over the appellant's objection:

(a) Does that judgment or order collaterally estop the appellant on issues that he could not appeal?

Does a holding of collateral estoppel on such issues violate due process?

LIST OF PARTIES

No list of parties is required, under Supreme Court Rule 14.1(b), because the names of all parties appear in the caption of the case.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE

Petitioner, MASON H. ROSE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second District, Division One, which affirmed a judgment of the Los Angeles Superior Court that dismissed his action upon sustaining a demurrer without leave to amend.

OPINION BELOW

The opinion of the California Court of Appeal was not certified for publication. A copy of that unpublished opinion, filed

March 5, 1991, appears in Appendix A at pages A 1-16.[1/]

A copy of the Los Angeles Superior Court's Order of Dismissal With Prejudice, filed August 4, 1989, appears in Appendix B at pages A 17-20. That is the judgment entered in favor of Respondents Home Savings and Roger and Christa Hawkins. A similar judgment was entered in favor of Respondent Fultz (A 2).

A copy of the California Court of Appeal's order dated March 25, 1991, denying Petitioner's petition for rehearing, appears in Appendix C at page A 21.

A copy of the California Supreme Court's order filed May 29, 1991, denying Petitioner's petition for review, appears in Appendix D at page 22.

1/ Citations to page numbers preceded by "A" are to pages of the Appendix to this petition. Citations to page numbers preceded by "CT" are to pages of the Clerk's Transcript on Appeal in the California courts.

JURISDICTION

The order of the California Supreme Court (Appendix D) was filed on May 29, 1991. It denied Petitioner's petition for review. This Court's jurisdiction is invoked under Title 28 U.S.C. section 1257, as the review of a final judgment rendered by the highest court of a State in which a decision could be had.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments 5 and 14 to the United States Constitution are set forth in Appendix E at pages A 23-24.

STATEMENT OF THE CASE

This is an appeal from a judgment for defendants, after a demurrer was sustained without leave to amend. The trial court (the Los Angeles Superior Court) ruled that all of Rose's claims were barred by res judicata or collateral estoppel, based on rulings of federal courts in a previous action by Fultz (one of the respondents)

against Rose.

The California Court of Appeal agreed and affirmed. It then denied Rose's timely petition for rehearing. The California Supreme Court denied Rose's timely petition for review.

Rose's claims all stem from the execution sale of his family home, to satisfy a default judgment against him in the federal District Court for the District of Colorado. Rose's claims do not depend on the underlying facts on which Fultz (the judgment creditor in Colorado) based her action against Rose. Rather they relate to the jurisdiction of the Colorado District Court, and the propriety of the steps taken by Fultz to enforce its judgment.

A. Procedural Background of This Action

Rose's complaint (CT 1-41) alleged that the execution sale of his family home was void and improper. "If the sale was im-

proper," California Code of Civil Procedure ("Cal. CCP") section 701.680 expressly authorizes an action by Rose, as judgment debtor, "to set aside the sale if [as here] the purchaser at the sale is the judgment creditor," and--whether or not the purchaser is the judgment creditor--"to recover damages caused by the impropriety."

Here Rose was the judgment debtor, and Fultz was the judgment creditor, in a diversity action brought by Fultz in the Colorado federal district court (CT 3, 10, 61). On December 11, 1984, the Colorado Court awarded Fultz a default judgment (CT 10, 61) for a total of $464,000, including $116,000 compensatory and $348,000 punitive damages. Fultz then pursued enforcement proceedings in Rose's home state of California, in the federal district court for the Central District of California (CT 11).

In March 1986, the California District Court ordered the sale of the Rose home to Fultz; that sale was made in April 1986, by a U.S. Marshal's deed executed and delivered on April 8 and recorded on April 9, 1986 (CT 25). Fultz resold the home to Mr. and Mrs. Hawkins (as contemplated in the court order) on May 2, 1986 (CT [unnumbered page between 28 and 29]).

This action makes three basic claims of voidness or impropriety. First, the Colorado default judgment (and the California enforcement proceedings that followed it) were void for lack of personal jurisdiction over Rose (CT 4-11). Second, the execution itself was void or improper, due to multiple violations of the applicable California homestead and execution laws; some of those violations were by the court, but others were by Fultz and not by any court order, including some that violated the court's order (CT 12-

34). Third, Fultz deliberately violated the applicable California automatic statutory stay, under Cal. CCP 916, by proceeding with the sale after Rose had notified her and the Marshal of the stay (CT 24-26).

Rose's complaint named four defendants. Judgment creditor Fultz was the primary defendant. Mr. and Mrs. Hawkins were named as the parties to whom Fultz resold the home (and who could acquire no better rights than Fultz), and also for having conspired with Fultz in her violations of California law. Home Savings was named only as the lender who financed the resale, and whose rights were dependent on those of the Hawkins.

The Hawkins and Home Savings demurred to the complaint (CT 82-106), concluding (CT 104) that their demurrer should be sustained without leave to amend because of the collateral estoppel effect of prior

federal court proceedings. Fultz had answered the complaint (CT 116-35), but made a companion motion for judgment on the pleadings (CT 140-59).

The trial court sustained the demurrer and granted the motion for judgment on the pleadings, both without leave to amend, and signed similar judgments of dismissal, one in favor of the Hawkins and Home Savings (CT 373), and the other in favor of Fultz.

In the unpublished opinion filed 3/5/91 (Appendix A), the Court of Appeal affirmed, holding that Rose's first two claims (based on jurisdictional issues, and on violations of California homestead and execution laws) were barred by federal decisions (Opinion at A 11-13), and that his third claim (for violation of the California automatic statutory stay) lacked merit because the challenged order directed the sale of real estate, so in the

absence of a bond "there was no stay in effect" (Opinion at A 15).

Rose filed a timely Petition for Rehearing on March 20, 1991. That petition was denied by the California Court of Appeal on March 25, 1991, and the California Supreme Court denied Rose's petition for review on May 29, 1991.

B. Rose raised the federal questions below.

The federal questions raised here, including the due process questions, were raised by Rose both in the trial court and in the California appellate courts. Even the non-due process questions are purely federal questions, because the demurrer, and the trial court's ruling on it, was based solely on the res judicata or collateral estoppel effect of federal judgments and orders.

Our main opposition to the demurrer (and companion motion for judgment on the pleadings), in the second paragraph of its

introduction, stated that Respondent Fultz "does not contend that our allegations are insufficient to establish voidness and impropriety, but only that they are barred by previous rulings of federal courts (CT 323; emphasis added).

We raised one of our due process contentions (that a holding of retroactive waiver of voidness of a default judgment, by a post-judgment appearance, violates due process), in the same opposition in the trial court (at CT 337). We stated that the Ninth Circuit order had not said the waiver was retroactive, and "[i]f it had, that would have been a violation of due process." We continued to raise the issue in our briefs (and petition for review) on appeal, but it was rejected at all levels, without any real discussion. For example, the Opinion (of the California Court of Appeal, at A 7) does not consider the issue, but assumes that "a

voluntary general appearance waiving any jurisdictional defect" applies to the original default judgment.

Our other due process contention (that a party cannot be collaterally estopped on issues he could not appeal in the prior proceeding) was also raised in the same opposition in the trial court (at CT 340-41). We stated that interpreting the Ninth Circuit order so as to give collateral estoppel effect to the order appealed from "would violate Munsingwear, contrary to the Ninth Circuit's express reliance on that case, and deny due process to Rose." We continued to raise the issue in a brief in the Court of Appeal, and in the Supreme Court. None of those courts discussed the issue, but all impliedly rejected our contention.

C. Factual and Legal Basis of Jurisdictional Claims

For each of Rose's three basic claims, this Statement will summarize the facts

and the law on which the claim is based, and the extent to which the merits of the respective claim have or have not been ruled on by the federal courts.

We recognize that it is unusual for a Statement of the Case to include a discussion of applicable law, but we submit that it is appropriate and necessary here. The law of the claims (as distinguished from the law of bar by collateral estoppel, which will be discussed in argument below) has generally not been the subject of controversy in this action, and it is necessary to an understanding of the issues that have or have not been submitted to or decided by the federal courts.

1. The default judgment was clearly void when entered.

Respondents have not disputed the facts or the law of voidness, either in the trial court or on appeal. The Complaint alleges facts that mandate the conclusion that the Colorado default judgment was

void for lack of personal jurisdiction, both because process was never served on Rose (CT 4-6), and for lack of territorial jurisdiction under the Colorado long-arm statute (CT 6-11).

The Colorado District Court's conclusion that service of process on Rose was proper (Opinion at A 3) was not just a general reference to Fed.R.Civ.P. Rule 4. Rather, it referred to "Rule 4 FRCP and, specifically, Rule 4(c)(2)(c)(ii) FRCP" (CT 57; emphasis added). Rule 4(c)(2)(C)(ii) provides for service by mail, which requires service by other means "[i]f no acknowledgment of service [on a specified form to be enclosed] is received by the sender within 20 days after the date of mailing."

Rose did not sign or return the acknowledgment form, either within the 20-day period (he could not, because he did not receive it within that period) or

at all (CT 5-6). Rule 4(c)(2)(C)(ii) "plainly states that service fails unless the defendant returns the signed acknowledgment form. Virtually every court that has examined the rule has reached that same interpretation." (Worrell v. B.F. Goodrich Co. (9th Cir. 1988) 845 F.2d 840, 841.

Thus the mailed service relied on by the Colorado Court to support its jurisdiction failed. Mailed service also failed for the other reasons alleged in the Complaint at CT 4-6. Furthermore, process in the Colorado action was never served by personal delivery to Rose (CT 4). In addition to the mailed service relied on incorrectly by the Colorado Court, Fultz attempted substituted service by service on Mrs. Rose at her home; that attempt also failed, because Rose and Mrs. Rose had separated, and he was no longer living there at the time of the attempt,

and also for the other reasons specified in the Complaint at CT 4-5.

The Colorado default judgment was therefore void for lack of personal jurisdiction, due to insufficiency of service of process.

The Colorado default judgment was also void for lack of territorial jurisdiction, for insufficient contacts with the State of Colorado, under the facts alleged in the Complaint at CT 6-10. For example, by the time the alleged tortious acts were committed by Rose (and they were committed outside of Colorado), and by the time the contract Rose was alleged to have breached had been executed (and it was executed outside of Colorado), the only possible damage to Fultz was to money and property that were already in Arizona (CT 7-10). That has been held to defeat Colorado long-arm jurisdiction, in Ruggieri v. General Well Service, Inc. (D. Colo. 1982)

535 F.Supp. 525, 536.

Rose never appeared in the Colorado District Court prior to its default judgment (Complaint at CT 6), which was entered on December 11, 1984 (CT 61), and he did not appeal from the default judgment (CT 349). Thus jurisdictional issues were not actually litigated by Rose, either before the default judgment or on direct appeal from it, so Rose was "free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Ins. Corp. of Ireland v. Compagnie des Bauxites (1982) 450 U.S. 697, 701.

2. Rose has not retroactively waived jurisdiction, and there has been no preclusive ruling on the merits of his jurisdictional claims.

Since the default judgment was clearly void for lack of jurisdiction when it was entered, the only question on that issue here is whether that voidness has been

retroactively waived by Rose, or whether his claim of voidness is otherwise precluded by later rulings of the federal courts. Neither has occurred.

Rose chose to make his jurisdictional collateral attack on the Colorado default judgment in the California District Court, where Fultz had registered the judgment and was proceeding to enforce it. Rose raised the service of process issue in opposition to a contempt citation, issued by the California District Court for his failure to answer questions (other than on jurisdictional issues) at a judgment debtor deposition. (CT 14-15.) Rose also raised that issue in a motion (in the California District Court) to set aside the default judgment (CT 15), under Rule 60(b)(4).

The California District Court determined the service of process issue against Rose (refusing to give any independent

consideration to the Colorado Court's conclusion, at the time of the default judgment, that it had jurisdiction), in its Order After Contempt Hearing July 15, 1985 (CT 16). However, that order was vacated when the Ninth Circuit's June 1987 Memorandum dismissed the appeal from it as moot (CT 74, 189), so that order of the California District Court has no collateral estoppel effect.

The Ninth Circuit's June 1987 Memorandum (CT 69-74, 184-89) said Rose's post-judgment general appearance "waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service" (CT 74, 189). It did not say that the waiver was retroactive, so as to validate the previous default judgment that was entered a full year before the general appearance. It implied the contrary, by stating that "[t]he parties may now pursue this case

before the Colorado district court which now has jurisdiction over the parties and may address the issues on the merits" (CT 74, 189; emphasis added).

Furthermore, if the Ninth Circuit was ruling that the waiver was retroactive, there would be no need for the Colorado Court to address the merits--either of the jurisdictional issues or the action itself--because the default judgment would thereby be validated. Only a holding of nonretroactivity would pave the way for a determination of the merits of the issues raised by Fultz' action against Rose in the Colorado District Court.

In addition to relying incorrectly on the Ninth Circuit's June 1987 Memorandum, the Opinion (at A 12-13) incorrectly concludes that "[l]itigation of the issue of personal jurisdiction was necessary to the final judgment in Colorado and the issue is therefore barred." Aside from

an incorrect definition of "actually litigated" (equating it with "necessarily decided," which is a separate requirement for collateral estoppel, as will be shown in argument below), the Opinion is wrong on the facts as well.

It is not clear which ruling the Opinion refers to as "the final judgment in Colorado," but there were only three rulings in Colorado (two by the district court and one by the Tenth Circuit), and none of the three could possibly preclude a further collateral attack based on lack of personal jurisdiction.

Presumably by "final judgment," the Opinion meant the December 1984 default judgment. That judgment did contain findings of personal jurisdiction, but argument will show that, in the absence of an appearance by the defendant, a default judgment cannot preclude a collateral attack for lack of jurisdiction.

The second ruling of the Colorado District Court was the denial of Rose's motion under Rule 60(b)(1) and (3), for fraud and mistake. That motion (CT 202-08) did not submit the issue of jurisdiction to the Colorado Court; that was the very basis of the Ninth Circuit's June 1987 ruling, so both sides are precluded from contending the contrary. The Colorado court's April 1986 "Order Denying Rose's Motions Under Rule 60" (CT 213-14) did not even mention jurisdiction or service of process.

Rose appealed to the Tenth Circuit from the April 1986 order denying his Rule 60 motion, not from the 1984 default judgment which he never appealed (CT 216, 349). In the last of the three Colorado rulings, the Tenth Circuit affirmed the discretionary denial of Rose's Rule 60 motion, in a brief order of May 10, 1988, the full text of which is as follows:

> "Upon consideration of all the issues raised in this case, we find that the district court did not abuse its discretion in denying the defendant's Rule 60(b) motion. Fed. R. Civ. P. Rule 60(b). All pending motions are denied and the judgment of the district court is affirmed.
>
> "AFFIRMED." (CT 79.)

The pending motions referred to and denied in that order were (1) a motion by Fultz to moot the appeal; and (2) "Rose's Motion to Permit Submission of Voidness [Service of Process] Question to This Court on This Appeal" (CT 217-33). Fultz opposed Rose's Motion, arguing that "Issues not Raised Before the Trial Court are Precluded on Appellate Review" (CT 234, 237-38).

Rose's reply did not dispute Fultz' assertion that the service of process issue had not been raised in his Rule 60 motion below, but asked the Court of Appeals to exercise its discretion to permit it to be submitted anyway, so the entire matter could be determined in the

one appeal that was already before the appellate court. By denying Rose's motion, the Tenth Circuit was refusing to consider the question (which is not even mentioned or discussed in the order), so its order cannot collaterally estop Rose on that question.

The judgment affirmed by the Tenth Circuit was the April 1986 order denying Rose's Rule 60 motion, not the 1984 default judgment that had never been appealed. Under Fed.R.Civ.P. 54(a), "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies" (emphasis added), so the affirmed "judgment" could only be the order denying the Rule 60 motion.

If the Opinion (at A 7-8) meant to say that the Tenth Circuit affirmed the 1984 default judgment in its entirety, that is a misstatement, both as a matter of fact and as a matter of law. As to the facts,

we have already seen that the 1984 judgment was not appealed; only the 1986 order denying the Rule 60 motion was before the Tenth Circuit on appeal. As to the law, it is established that "an appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought." (7 Moore's Federal Practice (2d ed. 1991) Para. 60.30[1] at p. 60-330; emphasis added).

D. Factual and Legal Basis of Homestead and Execution Claims

Rose's second basic claim (Complaint at CT 11-34) alleges multiple violations of the California homestead and execution laws. California state law was applicable to the enforcement of Fultz' federal judgment, after she registered it in the California federal district court (CT 11), under Rule 69(a) of the Federal Rules of Civil Procedure, which provides in relevant part:

"[T]he procedure on execution, in pro-

> ceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, . . ."

1. Rose lost his family home and the homestead exemption, and suffered other damages, due to multiple violations of California homestead and execution laws.

The California homestead laws protect the rights of the owner of a family dwelling, not only by providing for a cash exemption (which was $45,000 at the time Rose's home was taken), but by procedures that ensure an execution sale price that is close to fair market value, and that prevent a sale unless certain requirements are met. The homestead laws are contained in Article 4, sections 704.710 et seq., of the Code of Civil Procedure. California CCP section 704.740(a) provides, in relevant part (emphasis added):

> "[T]he interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and

the dwelling exemption shall be determined under this article."

Both Fultz and the California District Court ignored the California homestead laws, and deprived Rose of its protections by flagrant violations of those laws. While execution was stayed, Fultz obtained a bid from the Hawkins that she wanted to accept (CT 19), and from then on the Court refused to follow California law, ultimately ordering a private sale to the Hawkins instead of the public sale required by the execution laws (CT 19-23).

Many of the violations were ordered by the Court at Fultz' request, but some were not. For example, Fultz' violations began before any order of the California District Court, and even before the levy on Rose's home. In her instructions to the Marshal before the levy, Fultz failed to notify the Marshal (as required by California CCP 687.010(a)) that the property was a dwelling (Complaint at CT 12). That

would have triggered the homestead provisions of California law, and Fultz' violation of the statute is prima facie evidence that she failed to exercise due care, under California Evidence Code section 669.

Fultz also failed to notice or apply for a homestead hearing (CT 13), and no such hearing was ever held (CT 19). Such a hearing is required and governed by CCP 704.750 through 704.780, and under CCP 704.750(a) the levy on the dwelling must be released in the absence of a timely application.

Rose thereby lost his homestead rights (including all or part of a $45,000 exemption, and other rights that might have prevented a sale altogether); he would have qualified for those rights had a timely hearing been noticed and held (CT 13-14, 30-35). Rose was not aware of those rights until November 1985; he was

by then no longer entitled to homestead rights, by reason of his divorce from Mrs. Rose in October 1985 (CT 14). Even if the March 1986 sale order of the California District Court was correct, Fultz' violations of law damaged Rose, and were not ordered by any court.

Fultz even violated the Court's sale order, and those violations damaged Rose (CT 27-28).

2. Rose's appeal from the sale order was mooted by the transfer to Hawkins, and the Ninth Circuit expressly refused to reach the merits of the appeal.

Rose appealed from the March 7, 1986 order for the sale of the home, but that appeal was dismissed as moot by the Ninth Circuit's order in Fultz v. Rose (9th Cir. 1987) 833 F.2d 1380, which stated:

> "Fultz sold the property to Mr. and Mrs. Hawkins in compliance with the district court's March 7, 1986 order. Because Mr. and Mrs. Hawkins are not parties to this action, we are no longer able to grant any effective relief from that order or to reach the merits of this appeal.

> "In accordance with the Supreme Court's guidance in United States v. Munsingwear, 340 U.S. 36, 39 (1950), we dismiss this appeal and vacate the district court's order entered March 7, 1986. Vacation of the March 7 order shall not operate retroactively and shall have no effect on actions or conduct already undertaken in reliance on or under the authority of that order." (Emphasis added.)

Because of that dismissal, and the reason for it, neither the March 1986 sale order nor the Ninth Circuit's dismissal of the appeal from it has any collateral estoppel effect here. Argument will show that (a) because the Ninth Circuit expressly refrained from determining the merits of the appeal, its order cannot collaterally estop Rose on the issues of this appeal; and (b) the sale order cannot collaterally estop Rose because the mooting of his appeal from it prevented him from obtaining appellate review of that order.

E. Automatic Statutory Stay Claims

Rose's third basic claim (Complaint at CT 24-26) alleges that Fultz deliberately

proceeded with the Marshal's deed of the Rose home, in violation of the automatic statutory stay under California law, made applicable by Fed.R.Civ.P. 62(f).

That claim was the only one decided on the merits by the California Court of Appeal. Its holding was clearly wrong under California law, as Rose pointed out in a petition for rehearing in that court.

However, this claim is not essential to the questions presented in this petition, so it will not be discussed further here.

REASONS FOR GRANTING THE WRIT

The questions presented here involve the law of res judicata and/or collateral estoppel. Here Rose's action relates solely to the execution sale of his property, and thus it does not depend on the merits of Fultz' action against Rose that gave rise to the judgment on which the execution took place. Therefore Rose's cause of action here is not the same as

Fultz' cause of action in the federal courts, and the determinations here must be made under the law of collateral estoppel (issue preclusion), not res judicata (claim preclusion). Cromwell v. County of Sac (1877) 94 U.S. 351, 352-53.

A. The holding that a postjudgment general appearance validates a void judgment retroactively is contrary to law and also violates due process.

1. A void federal judgment may be collaterally attacked in a California state court.

According to 7 Moore and Lucas, Moore's Federal Practice (2d ed. 1991) Para. 60.41[2] at p. 60-417 (footnote omitted):

> "Certainly [Rule 60(b)] could not destroy the power to make a collateral attack in a state court upon a void federal judgment, since the state court need not, and should not, give full faith and credit to a void federal judgment. Since the judgment is a nullity the state court should so adjudge when the validity is appropriately called in question."

Here this California action is both necessary and appropriate. It is necessary because Rose and the Hawkins are

citizens of California, so there is no federal diversity jurisdiction. It is appropriate because this action involves not just California citizens, but California land and homestead laws as well.

A litigant should not be deprived of justice under the law because artificial boundaries--between states, and court systems--require him to question the actions of one court in another. Unless and until the merits of his claims have been finally determined by one of those courts, Rose is entitled to raise them and have them determined. That is what he seeks in this action.

2. Rose's postjudgment general appearance did not retroactively validate the void federal judgment.

Our Statement of the Case showed that the Colorado default judgment was clearly void when it was entered. We also showed that the Ninth Circuit did not state that Rose waived jurisdiction retroactively by

his postjudgment general appearance, and instead implied the contrary. Yet the Opinion (at A 11-13) apparently assumes the waiver was retroactive, without even discussing that issue that Rose raised below and in his briefs on appeal.

We are not aware of any federal law on this subject,[2/] but under the law of

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2/ This statement should now be corrected to say that we are not aware of any federal law since the Federal Rules of Civil Procedure were adopted in 1938; however, an earlier case, Feldman Inv. Co. v. Connecticut Gen. Life Ins. Co. (10th Cir. 1935) 78 F.2d 838, held that improper service had been waived and a judgment validated, both by a prejudgment general appearance and (without discussion of the retroactivity issue) by a postjudgment general appearance. According to 6 C.J.S. 82, Appearances sec. 48, "[t]he authorities differ" on the question of whether a waiver by a general appearance "after judgment may be applied retroactively so as to cure initial defects and render proper an otherwise void judgment." Feldman is one of 25 cases from 11 jurisdictions cited by C.J.S. as permitting such retroactivity, as opposed to 27 cases from 16 jurisdictions that deny retroactivity. See also cases cited in Lurvey, General Appearance After Judgment: The Dilemma of Retroactivity (1968) 19 Hastings L.J. 541.

Colorado (where the general appearance took place), it is clear that the waiver is not retroactive. The Colorado case relied on by Fultz, in her successful motion to dismiss Rose's appeal as moot, expressly held that a judgment void for lack of service was not retroactively validated by a later general appearance. (Weaver Const. Co. v. District Court (Colo. 1976) 545 P.2d 1042, 1046.)

3. A holding of retroactive waiver violates due process.

California law is the same as that of Colorado, by statute. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, holds that a general appearance did not retroactively cure defective service, and discusses the deprivation of due process inherent in a contrary rule (135 Cal.App. 3d at 549-50; footnotes omitted:

> "[H]ere we are--as fine an example as possible of the quotation above concerning metaphors and how unreflecting use of legal concepts leads to unintended results. The rule be-

> gan as an aid to justice and became one of automatic application, a trap for attorneys who find it difficult to predict safely what the next judge will call a 'general appearance,' depriving unwary defendants of '"The fundamental requisite of due process of law . . . the opportunity to be heard."'"

Rose raised that due process issue below, in the trial court at the first opportunity (CT 337); again in the California Court of Appeal, in his Reply Brief (at 21) and his Petition for Rehearing (at 13-14); and yet again in the California Supreme Court, in his Petition for Review (at 21). He raises it again here; interpreting the June 1987 Ninth Circuit Memorandum to retroactively validate the default judgment is a violation of Rose's rights under the Due Process Clauses of the United States Constitution.

B. The California court's definition of "actually litigated" is wrong.

One of the threshold requirements for collateral estoppel is that the issue to be precluded must have been "actually

litigated" in the prior proceeding. Cromwell v. County of Sac, supra, 94 U.S. at 353. The California Supreme Court has properly defined "actually litigated" as "properly raised, by the pleadings or otherwise, and . . . submitted for determination, and determined. People v. Sims (1982) 32 Cal.3d 468, 484; emphasis in original.

Here the Opinion (at A 12) ignores the Sims definition, although Rose quoted it in his Reply Brief (at 19), and instead opts for a later Court of Appeal definition in Frommhagen v. Board of Supervisors (1987) 197 Cal.App.3d 1292, 1301, fn. 3, emphasis added:

> "Issues are actually litigated if the judgment itself indicates they have been litigated or litigation of the issue was necessary to the judgment."

The Frommhagen definition renders the "actually litigated" requirement meaningless, by confusing it with (and telescop-

ing it into) the separate requirement that the precluded issue "must have been necessarily decided in the former proceeding." Lucido v. Superior Court (1990) 51 Cal.3d 335, 341. The authorities cited by Frommhagen relate to the "necessarily decided" requirement rather than the "actually litigated" requirement.

Apparently the Opinion uses the Frommhagen definition to conclude that, because the Colorado default judgment was accompanied by a finding of jurisdiction, that issue was actually litigated. Such reasoning would prevent any jurisdictional attack on a default judgment, because (expressed or not) any judgment necessarily decides that the court had jurisdiction to render it.

But any defendant who perceives that a court lacks jurisdiction over his person is free to ignore the proceedings, risk a default judgment, and challenge the

judgment in a collateral proceeding. (Ins. Corp. of Ireland, supra, 450 U.S. at 701). That is a due process right. (Id. at 702.)

C. Affirmance of a discretionary denial, of a motion for relief from judgment on grounds of fraud or mistake, does not constitute an affirmance of the underlying judgment.

The Court of Appeal uncritically accepted Respondents' characterizations of the rulings of the federal courts. Those characterizations were not even correct, and certainly were not clear from the rulings, as shown in our Statement of the Case above.

An egregious example is the conclusion (Opinion at A 7-8) that the Tenth Circuit's affirmance of the 1986 denial of Rose's Rule 60 motion also "affirmed the judgment against Rose [apparently referring to the 1984 default judgment, which was not appealed] in its entirety." We showed above (at A 23-24) that this

was not correct on the facts or the law. The law bears repeating here, and review by this Court. According to 7 Moore and Lucas, Moore's Federal Practice (2d ed. 1991) Para. 60.30[1] at p. 60-330:

> "[A]n appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought."

D. A party cannot be collaterally estopped on an issue that the courts refused to consider in the prior proceeding.

The Ninth Circuit's order in Fultz v. Rose (9th Cir. 1987) 833 F.2d 1380 [cert. denied (1988) 486 U.S. 1056], dismissing Rose's appeal from the sale order, expressly stated that, because the Hawkins were not parties to the Fultz action against Rose, "we are no longer able to grant any effective relief from that order or to reach the merits of this appeal." (Emphasis added.)

Thus the Ninth Circuit expressly refrained from determining the merits of the issues raised by Rose on his appeal from

the sale order, and Rose cannot be collaterally estopped from raising those issues in this action. "[I]f the court expressly refrains from determining an issue, no collateral estoppel results as to that issue. [Citations.] (People v. Huston (1989) 210 Cal.App.3d 192, 225.

Incidentally, even if the propriety of the sale order had been determined by the Ninth Circuit, Rose would still have other claims that are not dependent on the propriety of the order. Among them are the jurisdictional claims, Fultz' violation of law in failing to notify the Marshal that the property was a dwelling, disobedience of the order, and violation of the statutory stay.

E. A party cannot be collaterally estopped on issues that he could not appeal in the prior proceeding. A contrary holding would violate due process.

Even aside from the rule that there is no collateral estoppel on issues the court

refrains from deciding, there cannot be collateral estoppel on issues that could not be appealed in the prior proceeding. It is a due process requirement that the party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time. (Mueller v. J.C. Penney Co. (1985) 173 Cal.App.3d 713, 720.)

Whether or not the appellate court vacates the order appealed from when the appeal is mooted, the denial of the right to appeal (unless it is by the choice or because of the fault of the appellant) denies a fair hearing on the issues of the appeal. Rose raised that due process issue below (CT 341) and again in his Appellant's Opening Brief (at 19).

The Restatement of Judgments (Second), in section 28, says that there can be no collateral estoppel if "The party against whom preclusion is sought could not, as a

matter of law, have obtained review of the judgment in the initial action."

The Restatement rule is especially appropriate here, where Rose was deprived of his right to appeal by Fultz' wrongful transfer of the property to the Hawkins, in violation of the automatic statutory stay.

That rule should be applied whether or not the Court of Appeals has dismissed the district court judgment or order appealed from. According to 18 Wright, Miller & Cooper, Federal Practice and Procedure (1981) sec. 4433 at p. 317, the law is unclear, but "[i]t would be better to adopt a clear rule that preclusion is defeated by dismissal of an appeal for mootness, whether or not formal steps have been taken to vacate the trial court judgment."

That clarification of the law is needed, and should be supplied by this Court in this case.

CONCLUSION

This petition for certiorari should be granted, so these important questions can be decided on the merits by this Court.

Respectfully submitted,

JAMES M. WEINBERG
Attorney for Petitioner
MASON H. ROSE

APPENDIX A

3/5/91 Unpublished Opinion of California Court of Appeal

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B045490
(Super.Ct.No. SWC 87250)
[File-stamped] MAR 5 1991

MASON H. ROSE,

Plaintiff and Appellant,

v.

SUSAN T. FULTZ et al.,

Defendants and Respondents.

APPEAL from judgments of the Superior Court of Los Angeles County, Abraham Gorenfeld, Temporary Judge. (Pursuant to Cal. Const., art. VI, sec. 21.) Affirmed.

James M. Weinberg for Plaintiff and Appellant.

Aran & Miller, Kenneth J. Aran, and Jeff Berke for Defendants and Respondents,

Roger E. Hawkins, Christa M. Hawkins and Home Savings of America.

Ferrante & Ferrante and Joseph M. Ferrante for Defendant and Respondent Susan T. Fultz.

Mason H. Rose appeals from two judgments of dismissal, one in favor of Home Savings of America, F.A., Roger E. Hawkins and Christa M. Hawkins following an order sustaining their demurrers to Rose's first amended complaint without leave to amend, and one in favor of Susan T. Fultz following an order granting her motion for judgment on the pleadings without leave to amend. We affirm both judgments.

FACTS

Fultz, a Colorado citizen, retained Rose, a California attorney, to prosecute a wrongful death action after her husband was killed in a helicopter crash. The case settled in June 1980, for approxi-

mately $100,000 and Rose then enticed Fultz to invest $70,000 of her recovery in equipment leases involving restaurants in which Rose had an ownership interest. Rose personally guaranteed Fultz' investments and when the deal went sour Fultz sued Rose in the United States District Court for the District of Colorado. Rose failed to respond and his default was entered. Fultz' motion for default judgment was granted and the Colorado court specifically found that service of process on Rose was proper (Fed. Rules Civ. Proc., rule 4, 28 U.S.C.) and that it had jurisdiction over Rose pursuant to its "long arm" statute.[1] Judgment was entered the same day, awarding Fultz a total of $464,752.62, including punitive damages.

Fultz registered the Colorado judgment

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[1] All further references to rules are to the Federal Rules of Civil Procedure.

in the United States District Court for the Central District of California and began enforcement proceedings. A writ of execution was issued and in March 1985 the writ was levied on Rose's property at 37 Crest Road West, Rolling Hills, California. Rose then filed motions in the California court to set aside the Colorado default judgment for lack of personal jurisdiction (rule 60(b))[2] and to quash the writ of execution.

The California court took Rose's motion to set aside the judgment off-calendar and stayed the action "pending final adjudica-

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[2] As relevant, rule 60(b) provides that: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . .; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . .; or (6) any other reason justifying relief from the operation of the judgment."

tion of the jurisdictional issues by the Colorado district court." Rose failed to appear in Colorado to challenge the finding of jurisdiction, and on July 15, 1985, the California court denied Rose's motion to set aside the default judgment and ordered the immediate sale of the levied property. Rose appealed to the United States Court of Appeals for the Ninth Circuit.

Next, Rose filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Act. Fultz obtained relief from the automatic stay (a ruling which was affirmed on appeal) and a sale of Rose's property was scheduled. Two weeks later, Rose obtained ex parte orders staying the sale to allow him an opportunity to find a bona fide purchaser for the property.

But Rose did nothing to find a purchaser. Instead, while his Ninth Circuit appeal was pending, Rose filed another

rule 60(b) motion in the California court to set aside the same orders from which he was appealing. That motion was denied and Rose filed another appeal which was consolidated with the pending appeal. On December 11, 1985, Rose filed a rule 60(b) motion in the Colorado court in which he offered to admit liability for compensatory damages but sought relief from the punitive damage portion of the Colorado judgment. This motion was denied and Rose appealed to the Court of Appeals for the Tenth Circuit.

The California court denied Rose's motion to release his property from sale and on March 7, 1986, filed its "Order Vacating Stay of Execution, Directing Sale of Real Property to Judgment Creditor, and Directing Distribution of Funds Upon Closing," ordering the sale of the property to Fultz, the payment of $45,000 by Fultz to Rose's former wife to satisfy a homestead

claim asserted by her, and the resale of the property by Fultz to the Hawkins. Rose appealed that order to the Ninth Circuit. His applications to the California court and to the Ninth Circuit for stay orders pending appeal were denied.

On May 2, 1986, Rose's property was transferred to Fultz by Marshal's deed and, thereafter, from Fultz to the Hawkins.

On June 10, 1987, the Ninth Circuit dismissed Rose's consolidated appeals as moot, on the ground that the Colorado court obtained personal jurisdiction over Rose when he filed his rule 60(b) motion in that court without challenging personal jurisdiction, which was a voluntary general appearance waiving any jurisdictional defect. On December 11, 1987, the Ninth Circuit dismissed Rose's appeal from the California court's order of sale as moot. On May 10, 1988, the Tenth Circuit denied

Rose's pending motions, affirmed the Colorado court's denial of Rose's rule 60(b) motion, and affirmed the judgment against Rose in its entirety.

Sometime prior to September 6, 1988, Rose filed the within action in superior court, naming Fultz, the Hawkins and Home Savings as defendants. On September 6, 1988, Rose filed a first amended complaint to set aside the "void and improper" sale of his property, for compensatory and punitive damages, imposition of a constructive trust, an accounting and restitution. All of Rose's claims were based on allegations that the underlying Colorado default judgment was void for lack of jurisdiction and that Fultz, the Hawkins and Home Savings (the Hawkins' lender) had failed to comply with California's homestead and execution statutes.

Fultz moved for judgment on the pleadings and the Hawkins and Home Savings

demurred. The trial court granted the motion and sustained the demurrers without leave to amend on the ground that Rose's claims were barred by the doctrines of res judicata and collateral estoppel. Judgments of dismissal in favor of Fultz, the Hawkins and Home Savings were filed and this appeal followed.[3]

DISCUSSION

Rose contends that his claims and this action "have nothing to do with the merits of Fultz' claims against him the federal action that spawned the execution sale." According to Rose, his claims are based on the "void and improper" sale and this action is one brought pursuant to subdivision (c) of section 701.680 of the Code of

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[3] The facts have been stated in conformance with the usual rules on appeal from orders sustaining demurrers without leave to amend. (Koch v. Rodlin Enterprises (1990) 223 Cal.App.3d 1591, 1595; Coon v. Joseph (1987) 192 Cal.App.3d 1269, 1272; Barker v. Hull (1987) 191 Cal.App.3d 221, 224.)

Civil Procedure to set aside the sale and recover damages caused by improprieties in the sale.[4] We disagree.

Rose concedes that this action is based on his claims that the Colorado default judgment and the California order for sale are void for lack of personal jurisdiction; that the order for sale was void due to multiple violations of California's homestead and execution laws; that even if the order for sale was proper, Fultz

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[4] As relevant, section 701.680 states that: "(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason: [paragraph]) (1) The judgment debtor . . . may commence an action . . . to set aside the sale if the purchaser at the sale is the judgment creditor. . . . Any liens extinguished by the sale of the property are revived and reattach to the property with the same priority and effect as if the sale had not been made. [paragraph] (2) The judgment debtor . . . may recover damages caused by the impropriety. . . ."

Unless otherwise stated, all section references are to the Code of Civil Procedure.

failed to comply with certain homestead and execution laws; and that Fultz proceeded with the sale despite the existence of an automatic stay. These concessions establish that Rose's action is barred.

A.

Rose contends that jurisdictional issues were never actually litigated, and that his claims are consequently not barred by res judicata or collateral estoppel. We disagree.

In Colorado, the court expressly found that service of process and jurisdiction over Rose were proper. Thereafter, Rose appeared for the first time in that action to challenge the judgment by rule 60(b) motion but failed to challenge the Colorado judgment on jurisdictional grounds (rule 60(b)(4)). His failure to do so waived any jurisdictional defect. (Rules 12(b)(2) & (5) & 12(h)(1); Jackson v. Hayakawa (9th Cir. 1982) 682 F.2d 1344,

1347, appeal after remand (9th Cir. 1985) 761 F.2d 525.) Thereafter, the Tenth Circuit affirmed the Colorado court's orders.

Accordingly, the jurisdictional issue has been litigated, is the subject of a final judgment, and Rose cannot relitigate the issue in this action. Collateral estoppel bars Rose's action because that doctrine "precludes the relitigation of 'issues that were actually litigated and determined in the first action. Issues are actually litigated if the judgment itself indicates they have been litigated or litigation of the issue was necessary to the judgment. . . .'" State Farm Mutual Auto. Ins. Co. v. Superior Court (1989) 211 Cal.App.3d 5, 13, fn. 9, quoting Frommhagen v. Board of Supervisors (1987) 197 Cal.App.3d 1292, 1301, fn. 3.) Litigation of the issue of personal jurisdiction was necessary to the final judgment in Colorado and the issue is

therefore barred.

B.

Rose contends that the March 7, 1986, order for the sale of his property was void based on violations of the California homestead and execution laws and that he is entitled to litigate these issues in this case. We disagree.

The March 7, 1986, order of sale is not subject to collateral attack in this action. Rose's argument on this point is not that the California court was without the power to make the order, but that its order was erroneous under state law. If a court has jurisdiction over the subject matter and parties, the order or final judgment is not subject to collateral attack in a later proceeding, regardless of whether it is contrary to statute or otherwise erroneous. (Moffat v. Moffat (1980) 27 Cal.3d 645, 655-656.) Accordingly, this claim is barred.

C.

Finally, Rose contends that this action can go forward because he alleges that Fultz sold the property in violation of an automatic stay. According to Rose, the March 7, 1986, order of sale was automatically stayed pending his appeal to the Ninth Circuit because rule 62(f) and subdivision (a) of section 916, read together, give rise to a stay. Rose is wrong.

Rule 62(f) "entitles a judgment debtor to the same stay in the district court as would be accorded in a state court if (1) the judgment would result in a lien on the property of the judgment debtor and (2) the judgment debtor is entitled to a stay." (Hoban v. Washington Metro. Area Transit Authority (D.C. Cir. 1988) 841 F.2d 1157, 1158; rule 62(f), 28 U.S.C.) Rule 62(f) does not apply here because Rose, the "judgment debtor," was not "entitled to a stay" under section 916 (or

under any other statute).

Subdivision (a) of section 916 provides that, "[e]xcept as provided in Sections 917.1 to 917.9 . . ., the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from . . . ." (Emphasis added.) The exception covered by section 917.4 applies to Rose: "The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the sale . . . of real property" unless an undertaking or substitute therefore [sic] is given. The challenged order directed the sale of real property, no undertaking or substitute therefore [sic] was given, and there was no stay in effect.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

DEVICH, J.

APPENDIX B

8/4/89 Los Angeles Superior Court
Judgment of Dismissal With Prejudice

[File-Stamped] AUG 04 1989

CASE NO. SWC 87250

JUDGMENT OF DISMISSAL WITH PREJUDICE IN FAVOR OF DEFENDANTS HOME SAVINGS OF AMERICA, F.A., ROGER E. HAWKINS AND CHRISTA M. HAWKINS

MASON H. ROSE, V.,

Plaintiff,

vs.

SUSAN T. FULTZ aka SUSAN THERESE FULTZ AND SUSAN FULTZ-SMALL; ROGER E. HAWKINS; CHRISTA M. HAWKINS; HOME SAVINGS OF AMERICA, F.A., A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION; AND DOES 1 THROUGH 100,

Defendants.

The demurrer of Defendants Home Savings of America, F.A., Roger E. Hawkins and Christa M. Hawkins ("Moving Defendants") to the First Amended Complaint of Mason H.

Rose, V., having been duly presented to this Court, and all papers filed in support of and opposition to said Demurrer having been considered, along with argument of counsel, Aran & Miller by Kenneth J. Aran for Moving Defendants and James M. Weinberg and Mason H. Rose, V. for Plaintiff, and good cause being shown therefor;

IT IS HEREBY ORDERED that the Demurrer of Moving Defendants to the First Amended Complaint of Mason H. Rose, V. is sustained without leave to amend on each of the independent grounds set forth below:

1. The two claims providing the basis for the First Amended Complaint - (1) that the underlying Colorado default judgment was improperly entered against Plaintiff because the court lacked personal jurisdiction and (2) that the execution sale of Plaintiff Rose's property in California was improperly carried out - were heard and adjudicated against Plaintiff Rose

in prior actions in both California and Colorado. Accordingly, plaintiff Rose is now collaterally estopped from asserting the claims contained in the First Amended Complaint, and each of them, against the Moving Defendants.

2. The facts set forth in the First Amended Complaint fail to state a cause of action against Moving Defendants. Moreover, based upon the court's review of the First Amended Complaint, the demurrer and all documents in support of and in opposition thereto, as well as the arguments of counsel at the hearing, the court finds that Plaintiff is unable to further amend his pleadings to state a valid cause of action against Moving Defendants. This is because the facts provided by Plaintiff Rose clearly show that the subject property was purchased by the Hawkins and financed by Home, respectively, pursuant to a valid Court Order expressly authoriz-

ing the purchase. Accordingly, based upon Rose's own allegations, the acts engaged in by Moving Defendants relating to this matter cannot possibly give rise to liability against Plaintiff Rose. Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is dismissed, with prejudice, in favor of Moving Defendants Home Savings of America, F.A., Roger E. Hawkins and Christa M. Hawkins, and that said Moving Defendants are awarded their costs of suit herein.

DATED: 8/4/89

/s/ Abraham Gorenfeld
JUDGE OF THE SUPERIOR COURT

APPENDIX C

3/25/91 Order Denying Rehearing, by the California Court of Appeal

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 1 DATE: 03/25/91

RE: Rose, Mason H.
vs.
Fultz, Susan T.
Home Savings of America
2 Civil B045490
Los Angeles NO. SWC87250

THE COURT:

Petition for rehearing denied.

APPENDIX D

5/29/91 Order Denying Rose's Petition for Review, by the California Supreme Court

[File-Stamped] May 29, 1991

Second Appellate District, Division One,
No. B045490 S020519

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

MASON H. ROSE, Appellant

v.

SUSAN T. FULTZ Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT 14

1. All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges of immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .

(2)

No. USSC NO. 91-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MASON H. ROSE,

Petitioner,

v.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A.,

Respondents.

RESPONSE OF ROGER E. HAWKINS, CHRISTA M. HAWKINS AND HOME SAVINGS OF AMERICA, F.A. TO PETITION FOR WRIT OF CERTIORARI OF MASON H. ROSE

KENNETH J. ARAN
ARAN & MILLER
10920 Wilshire Boulevard
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(310) 208-6226

Counsel of Record
For Respondents, Roger E. Hawkins, Christa M. Hawkins and Home Savings of America, F.A.

JEFF BERKE, ESQ.
10920 Wilshire Boulevard, Suite 1000
Los Angeles, California 90024

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CASES

STATUTES AMD RULES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MASON H. ROSE, Petitioner

vs.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A., Respondents

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RESPONSE OF ROGER E. HAWKINS, CHRISTA M. HAWKINS AND HOME SAVINGS OF AMERICA, F.A. TO PETITION FOR WRIT OF CERTIORARI OF MASON H. ROSE

Respondents Roger E. Hawkins, Christa M. Hawkins and Home Savings of America, F.A.[1] ("Respondents") hereby respond to and oppose the Petition for a Writ of Certiorari filed in this matter by Petitioner Mason H. Rose ("Rose") on the grounds that the California state

[1]Home Savings of America, F.A. is a federal savings bank owned by H.F. Ahmanson & Company, a Delaware corporation. It has no subsidiaries that are not wholly owned.

court judgment below is not appropriate for review by the Supreme Court of the United States.

I.

QUESTIONS PRESENTED

The four "questions presented" by Rose at p. i of his petition, in and of themselves, show that this case is not one over which this Court can properly assert jurisdiction. Indeed, the first two questions ask the Court to decide an issue that was already decided in both the Ninth and Tenth Circuits in prior federal court actions. (Appendix, pp. A6-11, B2-5). If a reviewable issue existed, it existed in those actions, not in the case at bar, which merely held that the prior orders collaterally estop Rose from again asserting his jurisdictional claims in the California state court. (Rose Appendix, pp. A11-

13, A18-19).[2]

Similarly, the second two questions presented by Rose are ones which should have been asserted, if at all, in the prior federal court proceedings which gave rise to the judgment under attack. Moreover, the questions, as stated, are not questions over which this Court can assert jurisdiction since they relate to the application of California law by a California court and, thus, do not present federal questions.

In addition to the questions set forth by Rose, which, as noted, demonstrate this Court's lack of jurisdiction, Respondents assert that the following questions should be considered by the Court in determining whether to grant the instant petition:

[2]The California trial court and appellate judgments are both included in the appendix to Rose's petition. When referring to said documents in this response, Respondents will cite to Rose Appendix, p. _____.

1. May this Court determine issues of federal due process which were not adequately presented in or passed upon by the state court?

2. Does the petition fail to present a basis for review by this Court and/or does the existence of a separate and independent non-federal ground for the California court's decision prevent this Court from exercising jurisdiction over the instant matter?

a. Does the California state court's application of California law relating to collateral estoppel give rise to a federal question within the purview of this Court?

b. Does the California state court's determination that Rose's complaint constituted an improper collateral attack on the prior federal judgments pursuant to California law give rise to a federal question within the purview of this Court?

c. Does the California state court's determination that Rose is unable to set forth a valid cause of action against these Respondents in his complaint give rise to a federal question within the purview of this Court?

3. Does Rose's failure to properly set forth the grounds for the purported jurisdiction of this Court in his petition require its denial?

II.

JURISDICTION

Rose's purported "statement" of the jurisdiction of this Court to hear the instant matter is grossly inadequate (Petition, p.3). Rose generally cites 28 U.S.C. Section 1257 as the basis for this Court's jurisdiction, but fails to enlighten either the Court or the Respondents as to which part of that Statute he contends is applicable, or the reasons therefor. (See Rules of the Supreme Court of the United States, 10, 14(h)(j)). It is Respondents' position that this Court lacks the jurisdiction to grant Rose's petition, and that Rose's failure to present an adequate jurisdictional statement impliedly, but undeniably, recognizes this fact. (See discussion, Section IV(E), infra.)

III.

STATEMENT OF THE CASE

Respondents will not burden this Court with a point-by-point refutation of the lengthy "Statement of the Case" presented by Rose in his petition (pp. 3-30). Indeed, it is Respondents' position that the bulk of Rose's statement constitutes nothing more than an attempt to reargue the merits of the claims he asserted in the California courts (and previously in the California and Colorado District Courts and the Ninth and Tenth Circuits), rather than provide the court with authority as to why it should assert jurisdiction over this matter. As such, most of Rose's statement is irrelevant to the Court's determination of the instant petition. Nonetheless, in order for the Court to accurately assess the dubious merits of Rose's petition, Respondents believe it important to correct certain of its

inaccuracies.

1. To begin with, Rose incorrectly characterizes the California judgment as being based solely on the doctrine of res judicata/collateral estoppel (Petition, pp.3-4). In doing so, Rose ignores the separate and independent ground asserted by the trial court in its judgment, i.e., Rose's inability to set forth a valid cause of action against Respondents. (Rose Appendix, pp. A19-20). This omission is significant because the existence of such a clearly non-federal ground for the state court's decision in and of itself requires the denial of the instant petition. (See discussion, Section IV(D)(3), infra.)

2. Rose similarly ignores the discussion by the California Court of Appeal, in support of its decision affirming the trial court judgment, of the doctrine of collateral attack, which

is related to but separate from res judicata/collateral estoppel (Rose Appendix, p. A13). Again, collateral attack was relied upon as an independent (and clearly non-federal) ground for the California judgment, precluding review by this Court. (See discussion, Section IV(D)(2), infra.)

3. Rose's repeated assertion that he adequately raised the issue of due process in the California courts (Petition, pp. 9-11, 35, 41), is wholly belied by the record. If anything, Rose's mention of due process in the California court consisted of a few isolated, throwaway references, which lacked <u>any</u> discussion or citation of federal authorities. This type of fleeting and general reference to a federal right is insufficient to confer jurisdiction upon this Court, particularly where the state court gave no evidence that it considered any

federal issues in making its decision. (See Section IV(C), infra).

IV.

LEGAL ARGUMENT

A. INTRODUCTION

The instant petition marks the third time that Rose has petitioned this Court for a Writ of Certiorari in connection with the events that led to the judgment below.[3] Although the precise arguments contained in his petitions may vary, the underlying basis remains the same: Rose will not rest until he finds a court - any court - which will render him a favorable decision. Thus far, he has been unsuccessful in achieving his goal in the District Courts of Colorado and California, the United States Bankruptcy Court for the Central District of

[3]See Rose v. Fultz, 486 U.S. 1007, 100 L.Ed.2d 197, 108 S.Ct. 1733 (1988); Rose v. Fultz, 486 U.S. 1056, 100 L.Ed.2d 925, 108 S.Ct. 2842 (1988).

California, the Ninth and Tenth Circuit Courts of Appeal, the Superior Court of California, the California Second District Court of Appeal and the California Supreme Court.

Similarly, this Court has deemed it advisable to deny each of Rose's prior petitions. There is nothing contained in his latest document to warrant a different result and it is respectfully requested that the instant petition therefore be denied.

B. SUMMARY OF ARGUMENT

The instant petition must be denied by this Court because Rose fails to set forth an adequate basis for this Court's review. Indeed, the record shows that the California state judgment was founded on three separate and independent non-federal grounds - collateral estoppel, collateral attack and failure to set forth a cause of action. The existence of any of these

grounds, by itself, would be sufficient to defeat Supreme Court jurisdiction. Moreover, even if a federal question did exist with no independent state grounds to support the California judgment, Rose failed to adequately present such question in the California court so as to preserve it for review here.

For all of the above reasons, Rose's petition should be denied.

C. ROSE'S FAILURE TO ADEQUATELY RAISE THE DUE PROCESS ISSUE IN THE STATE COURT PREVENTS HIM FROM RAISING IT HERE

The Supreme Court is without jurisdiction to rule on an issue that has not been presented "and passed upon" in the state court below. See Webb v. Webb, 451 U.S. 493, 496-97 68 L. Ed. 2d 392, 397, 101 S.Ct. 1889 (1981):

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the

record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

As noted in Webb, it is required that a federal issue be adequately raised in the state court by the petitioning party, as opposed to an off-handed reference hidden in the party's brief. See also Board of Directors of Rotary Intl. vs. Rotary Club, 481 U.S. 537, 550, n.9, 95 L. Ed.2d 474, 487, 107 S.Ct. 1940 (1987):

> "[The] casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 USC Section 1257 (2)..."

Rose's arguments in the instant petition must be measured against the above rules. By his own admission, Rose

purportedly "raised" the constitutional due process question in the trial court through his bare mention of the words "due process" in two isolated instances in opposition papers spanning more than 40 pages. (Petition, pp. 9-11,[4] CT 322-365). These vague references were unaccompanied by any discussion of the Constitution, constitutional language relating to due process, or any case discussing federal due process concerns. (See Appendix, pp. C1-4).[5]

Rose's contention (at pp. 35-41 of his petition) that he raised the due process issues in the California

[4]In addition to being factually unsupportable, Rose's discussion in his petition with regard to his raising of the federal questions in the court below falls woefully short of the standard required by the Supreme Court Rules. (Rules of the United States Supreme Court, 14(h)).

[5]The pertinent passages from the record containing Rose's references to "due process," as cited in his petition, are reproduced in Appendix C hereto.

appellate courts is equally dubious. Thus, at p. 19 of his opening brief in the California Court of Appeals, Rose simply cited his opposition brief reference to due process without elaboration. (Appendix, pp.C5-6)

On page 21 of his reply brief in the Court of Appeals, Rose cited the California case of In Re Marriage of Smith (1982) 135 Cal.App.3d 543, which was decided under California law, and based thereon, flatly states that "a determination of retroactive validation [of a default judgment] would be a violation of due process." (Appendix, p. C7). Again, there is no discussion whatsoever of a due process "issue," nor is there citation to any federal case, statute or constitutional provision. Indeed, the very paragraph in which the words "due process" appear solely involves a discussion of California law (Id.).

Rose's petition for Rehearing in the California Court of Appeals contains a reference to "due process" at pp. 13-14. It is here that Rose makes his first identification of the "respective Due Process Clauses of both the United States and California Constitutions." (Appendix, pp. C8-10). However, the reference is again perfunctory and devoid of discussion of the constitutional provisions themselves, or any cases which interpret them. As previously stated, a purported federal issue cannot be raised in such an off-handed manner in the state court and then argued in detail at the United States Supreme Court level.[6]

According to Rose, the final time he "raised" the due process issue in the

[6]See, Board of Directors of Rotary Intl. v. Rotary Club, supra, 481 U.S. at 550, 95 L.Ed.2d at 487, holding that an issue raised for the first time in a petition for an appellate rehearing was inadequately raised in the state court.

state court occurred at p. 21 of his Petition for Review filed with the California Supreme Court (Petition, p. 35). Although Rose again makes a blanket reference to the "Due Process Clauses of both the United States and California Constitutions," the reference is without discussion and appears in a section of his brief that solely rests upon California law. (Appendix, pp. C11-12).

Both the California Court of Appeals, on the request for rehearing, and the California Supreme Court denied Rose's petitions without opinion. (See Rose Appendix, pp. A21-22). Thus, as stated in Fuller vs. Oregon, 417 U.S. 40, 50, n. 11, 40 L. Ed. 2d 642, 653, 94 S.Ct. 2116 (1974):

> "[When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state

courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Rose cannot make such an affirmative showing here. Instead, this case resembles Bankers Life and Casualty Company vs. Crenshaw, 46 U.S. 71, 77, 100 L. Ed. 2d 62, 71, 108 S.Ct. 1645 (1988), where the Court held that a reference in a brief that the court's award "violates constitutional principles" did not adequately raise a federal issue in the state court proceeding:

> "The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this court to specify the constitutional

provision it is relying upon. Cf. Taylor vs. Illinois, 484 U.S. 400, 407, n. 9, 98 L. Ed. 2d 798, 108 S.Ct. 646 (1988) ('A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights...')."

Because Rose failed to adequately raise his purported due process concerns in the state court, he is barred from having them reviewed here.

D. ROSE'S FAILURE TO SET FORTH A FEDERAL QUESTION FOR REVIEW AND/OR THE EXISTENCE OF INDEPENDENT STATE LAW GROUNDS FOR THE CALIFORNIA COURT'S DECISION PREVENT THIS COURT FROM GRANTING ROSE'S PETITION

Without a federal issue underlying a state court judgment this Court lacks jurisdiction to grant a petition for review. (28 U.S.C. Section 1257; Beals v. Cone, 188 U.S. 184, 188, 47 L.Ed.

435, 23 S.Ct. 275 (1902)). Moreover, even if a federal issue exists, Supreme Court jurisdiction will be defeated where a separate and independent non-federal ground for the state court's decision is also present.

In the case of Fox Film Corporation vs. Muller, 296 U.S. 207, 210, 80 L. Ed. 158, 159, 56 S.Ct. 183 (1935), this Court explained:

> "[It is a] settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Supreme Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

As will be shown, the existence of several separate and independent state grounds for the California court's decision requires the denial of the

instant petition.

1. THE CALIFORNIA COURT'S APPLICATION OF COLLATERAL ESTOPPEL WAS A DETERMINATION UNDER STATE LAW AND NOT SUBJECT TO REVIEW BY THIS COURT

The California judgment, both at the trial court level and on appeal, was based in part on the court's application of the doctrine of collateral estoppel. (Rose Appendix, pp. A11-13, A18-19). In his petition, Rose attempts to argue that the state court's invocation of collateral estoppel raised an issue of federal law. (Petition, pp. 40-43). This contention is without basis.

The provisions of California Code of Civil Procedure Sections 1908-1911, inclusive, govern the application of the doctrine of res judicata\collateral estoppel in California. Accordingly, when the court below invoked the doctrine of collateral

estoppel as a partial basis for the subject judgment against Rose, it was acting in compliance with the laws of the state in which the court sits. E.g. California State Auto Assn. Inter-Ins. Bureau v. Superior Court, (1990) 50 Cal.3d 658, 665; Trujillo v. County of Santa Clara, 775 F.2d 1359, 1366 (9th Cir. 1985).

It is well-settled that such a state court determination will not give rise to a "federal question" reviewable by this Court upon a petition for Writ of Certiorari. See e.g., Agins v. Tiburon, 447 U.S. 255, 259, n. 6, 65 L. Ed. 2d 106, 111, 100 S.Ct. 2138 (1980); Patterson v. Colorado, 205 U.S. 454, 461, 51 L. Ed. 879, 27 S.Ct. 556 (1907).

In Northern Pacific Railroad Co. v. Ellis, 144 U.S. 458, 36 L.Ed. 504, 12 S.Ct. 724 (1891), this Court dismissed a writ seeking review of a Wisconsin Supreme Court judgment that was based on

a finding of res judicata. In so doing, the Court noted:

> "The judgment before us was rendered in accordance with well-settled principles of general law, not involving any Federal question. . ." 144 U.S. at 465.

See also Gaar, Scott & Co. v. Shannon, 223 U.S. 468, 471, 56 L.Ed. 510, 32 S.Ct. 236 (1911); Creswell v. Knights of Pythias, 225 U.S. 246, 263, 56 L.Ed. 1074, 32 S.Ct. 822 (1911), where this Court reiterated that a state court determination based on res judicata will not be deemed a federal issue subject to Supreme Court review.

Rose's real complaint in this matter appears to lie with the federal court orders previously rendered. However, the California state court proceeding was not the appropriate place for him to raise such an argument. (See

Discussion, Section IV(D)(2), infra).[7]

Because Rose, in his petition, attacks the California judgment on the ground that it improperly applied the doctrine of collateral estoppel, he has failed to set forth a federal or constitutional issue, and his petition must be denied. (28 U.S.C Section 1257, Rules of the Supreme Court of the United States, 10).

2. THE CALIFORNIA APPELLATE COURT RULING THAT ROSE'S CLAIMS CONCERNING THE SALE OF HIS PROPERTY CONSTITUTED AN IMPROPER COLLATERAL ATTACK ON A PRIOR JUDGMENT WAS A STATE COURT DECISION THAT IS NON-REVIEWABLE IN THIS COURT

[7]Rose clearly had his opportunity to review the federal court rulings and indeed availed himself of that opportunity by twice petitioning for rehearings and upon the denial of such petitions, petitioning this Court for a Writ of Certiorari. When this Court denied his requests to be heard, Rose's rights to attack the federal decisions ended.

As previously noted, Rose's attempt to make an end run around the prior federal court rulings by virtue of his California state court action was deemed to be an impermissible collateral attack by the California Court of Appeal. In that regard, the court stated:

> "If a Court has jurisdiction over the subject matter and parties, the order or final judgment is not subject to collateral attack in a later proceeding, regardless of whether it is contrary to statute or otherwise erroneous." (Rose Appendix, p.A13).

Noting that the California District Court and Ninth Circuit clearly had valid jurisdiction over Rose, the court cited a California Supreme Court case, Moffat vs. Moffat (1980) 27 Cal.3d 645, 655-656, to support its holding.(Id.) Because the collateral attack doctrine

formed a separate ground for the court's decision based solely upon its application of state law, it constitutes an additional reason why this Court must deny Rose's petition.

3. THE CALIFORNIA COURT'S SUSTAINING OF THE DEMURRER BY RESPONDENTS ON THE GROUNDS THAT THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION AGAINST THEM CONSTITUTES AN INDEPENDENT STATE LAW GROUND THAT IS NON-REVIEWABLE BY THIS COURT

In the instant case, the trial court judgment could not be plainer as to the grounds for its decision. It held, in relevant part, that:

> "the Demurrer of Moving Defendants to the First Amended Complaint of Mason H. Rose, V., is sustained without leave to amend on each of the independent grounds set forth below..." (Rose Appendix, p.A18).

The Court then set forth the two

grounds upon which it based its decision: (1) collateral estoppel and (2) failure to state a cause of action against the Respondents herein. (Id. at pp. A18-19). As to the second ground, the Court rendered its opinion that Rose would be unable to amend his pleadings to state a valid cause of action against Respondents herein because:

> "the facts provided by Plaintiff Rose clearly show that the subject property was purchased by the Hawkins and financed by Home, respectively, pursuant to a valid Court Order expressly authorizing the purchase. Accordingly, based upon Rose's own allegations, the acts engaged in by [Respondents herein] relating to this matter cannot possibly give rise to liability against Plaintiff Rose." (Id. at pp. A19-20).

It would hardly seem to need

argument that the sustaining of a demurrer by a California court on the grounds that the complaining party is unable, as a matter of California law, to state a claim, is purely a state action with no federal or constitutional overtones whatsoever. See generally, Agins v. Tiburon, supra. As such, the trial court's determination that Rose could not state a cause of action bars this Court from asserting jurisdiction over the instant cause and requires the dismissal of Rose's petition. E.g., Fox Film Corp. v. Muller, supra.

E. ROSE'S FAILURE TO ADEQUATELY SET FORTH THE BASIS FOR THIS COURT'S JURISDICTION IS CAUSE TO DENY THE PETITION

Rose's petition does nothing more than rehash the arguments he raised below as to why each and every court that has heard the claims leading to the state court judgment has been in error.

Despite his burden to do so, he presents no authority supporting his position that this is an appropriate case for Supreme Court review.

As previously discussed, Rose's statement of the jurisdiction of this Court (Petition, p. 3) is woefully inadequate and in violation of the Rules of the United States Supreme Court, 10 and 14 (h)(j). Thus, although he makes a brief, general reference to 28 USC Section 1257, he does not specify which portion of the statute applies to the instant case, nor does he provide any clue as to why this case would fall within the provisions of such statute. Inasmuch as it is Rose's burden, as Petitioner, to direct the Court and Respondents to the jurisdictional basis he is asserting, Rose's failure to meet this burden should, in and of itself, require the denial of his petition. E.g. Gorman v. Washington University,

316 U.S. 98, 101, 86 L.Ed. 1300, 1302 (1942).

F. ROSE'S CLAIMS OF ERROR ARE WITHOUT MERIT

Aside from the fact that this Court must deny Rose's petition for all of the jurisdictional and procedural reasons set forth above, Rose's claims of error in the state court proceedings are simply wrong. In a nutshell, the California judgment was correct for the following reasons:

1. The June 1987 Ninth Circuit Order unequivocally ruled that Rose had waived any objections to the exercise of jurisdiction over him by the Colorado District Court (Appendix, pp. A6-11). Because the Ninth Circuit clearly had jurisdiction over Rose he is barred by California law from collaterally attacking that Order in the California state court proceeding. (See Moffat v. Moffat (1980) 27 Cal.3d. 645,

655-56). Thus, Rose was correctly estopped from reasserting claims in the state court which arose from his much-litigated contention that the Colorado District Court lacked jurisdiction over him to grant the 1984 default judgment that ultimately gave rise to the subject proceedings.

2. The December 1987 Ninth Circuit Order provides, in relevant part, that: "Fultz sold the Rose property to Mr. and Mrs. Hawkins [Respondents herein] in compliance with the district court's March 7, 1986 order." The Court further stated that "Vacation of the March 7 order shall not operate retroactively and shall have no effect on actions or conduct already undertaken in reliance on or under the authority of that order." (Appendix, p. D2). Clearly the quoted language was meant to uphold the validity of the sale of Rose's property to the Hawkins. To claim otherwise, as

Rose does, is to simply ignore the existence of the "non-retroactive" portion of the court's opinion, contrary to the basic rules of construction of written documents. (See generally Ocean Shore Railroad Co. v. Doelger (1954) 127 Cal.App.2d 392, 399; Spearman v. J & S Farms, Inc., 755 F.Supp. 137, 140 (D.S.C. 1990).

3. As previously noted, the December 1987 Ninth Circuit decision recognized that the subject property was purchased by Respondents in compliance with the express commands of a valid court order.[8] Because Rose's only claims against Respondents resulted from their purchase of the subject property

[8]The Ninth Circuit must have found the District Court's order of sale valid in the first instance. If such order was void, as argued by Rose, there would be nothing to vacate, non-retroactively or otherwise. As the California Court of Appeals noted, a valid court order cannot be collaterally attacked in another proceeding. (Rose Appendix, p.A13).

pursuant to such order, it is clear that Rose is unable to state a valid cause of action against them. Accordingly, the Court's ruling that Rose's Complaint must be dismissed against Respondents was a reasonable and correct decision which cannot be overturned by Rose in this forum. (Rose Appendix, p.A20).

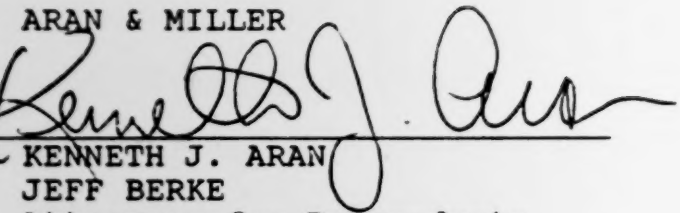
V.

CONCLUSION

Rose would have this Court believe that he is an innocent litigant who has been unfairly deprived of his day in court. Nothing could be further from the truth. Indeed, Rose has had many days in many courts. The time has now come to end Rose's abuse of the instant litigants, as well as the system itself. Accordingly, it is respectfully requested that the Petition for Writ of

Certiorari be denied.

ARAN & MILLER

By: 

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Attorneys for Respondents
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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-6202
86-5528

DC# CV 85-1854-TJH
MEMORANDUM*

[File Stamped] JUN 10 1987

SUSAN THERESE FULTZ, a/k/a/
SUSAN FULTZ-SMALL,

Plaintiff-Appelee,

v.

MASON H. ROSE, V,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding
Argued and Submitted December 3, 1986 - Pasadena, California

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: ANDERSON, PREGERSON**, and CANBY, Circuit Judges.

Appellant, Mason Rose (Rose), filed separate appeals from two judgments rendered by the United States District Court for the Central District of California. In both appeals, Rose attacks the validity of a default judgment entered against him by the United States District Court for the District of Colorado arguing that the Colorado court lacked personal jurisdiction over him because of improper service of process. These appeals were consolidated along with appellee's, Susan Fultz's (Fultz) motion in this court to dismiss on the ground of mootness or to suspend Rose's appeals.

**Judge Pregerson was randomly selected to replace Judge Solomon as a member of this panel because of the death of Judge Solomon

I. **FACTS**

On November 10, 1983, Fultz filed an action against Rose, an attorney, in the Colorado district court. Fultz made several unsuccessful attempts to serve Rose personally, both at his California residence and California law office. On February 20, 1984, Fultz served Wynonah Rose, appellant's wife, at a residence located at 37 Crest Road West, Rolling Hills, California. In addition, Fultz sent a summons by registered mail to Rose's law office on February 21, 1983.

Fultz made several motions over a period of eight months, the last of which was a motion for default. Rose failed to answer or appear in any of these motions. On December 5, 1984, Fultz obtained a default judgment against Rose from the Colorado district court awarding her $116,616 for compensatory damages and $348,137 for punitive damages, based on claims of

personal guarantee of a restaurant equipment lease, conversion of personal property, and breach of fiduciary duty.

On January 17, 1985, Fultz filed an action in the United States District Court for the Central District of California to enforce her Colorado judgment against Rose. She subsequently served notice on Rose to take a debtor deposition. When Rose failed to appear for the deposition, Fultz sought to hold him in contempt. District Judge Terry J. Hatter denied Fultz's contempt motion, but ordered Rose to attend a subsequent deposition. Rose attended the deposition as ordered, but refused to answer questions relating to anything other than personal jurisdiction. As a result, Fultz filed a second motion for contempt against Rose. At the same time that Fultz filed her contempt motion, Rose filed a motion to set aside the default judgment of the Colorado court

pursuant to Rule 60, Fed. R. Civ. P., because of lack of personal jurisdiction in the Colorado district court.

The court set the hearing on Fultz's motion for contempt for July 15, 1985. The court took Rose's motion to set aside the Colorado judgment off the calendar. At the July 15th hearing, the parties' arguments focused on the validity of the Colorado judgment. Judge Hatter ruled against Rose on his motion to set aside the Colorado judgment and, in addition, found Rose in contempt for failing to comply with the earlier court order to participate in the debtor deposition. Rose appeals both decision to this court.

On November 18, 1985 Rose filed a motion under Rule 60(b) to set aside Judge Hatter's July 15, 1985 decision. Judge Hatter denied Rose's motion on December 18, 1985. In March, 1986, this court consolidated Rose's two appeals

and remanded them nunc pro tunc so the district court could dispose of Rose's November 18, 1984 Rule 60(b) motion.

On December 11, 1985, while pursuing his Rule 60(b) motion in the California district court and his appeal to this court, Rose filed a Rule 60(b) motion in the Colorado district court for relief from the punitive damages and to correct the default judgment entered by that court in December, 1984. Rose offered to confess liability for compensatory damages. On March 14, 1986, Fultz filed a motion in this court to dismiss both of Rose's appeals to this court on the ground of mootness. In the alternative, Fultz seeks to suspend these appeals while her case in Colorado is being litigated.

II. DISCUSSION

The single issue addressed by this court is whether Rose's appearance in the Colorado district court to set aside

the default judgment renders moot the appeals filed by both Fultz and Rose. We find that it does.

The underlying argument in the consolidated appeals before this court is that the Colorado district court lacked personal jurisdiction over Rose because he was never properly served in accordance with the provisions of Rule 4 of the Federal Rules of Civil Procedure. Therefore, if the Colorado district court had personal jurisdiction over Rose, either because Rose conferred jurisdiction upon the Colorado district court, or Rose waived his right to complain of a defect in service or personal jurisdiction, then the appeals before this court can properly be dismissed as moot. We find that both events occurred.

Jurisdiction attaches if a defendant makes a voluntary general appearance. Jackson v. Hayakawa, 682

F.2d 1344, 1347 (9th Cir. 1982), appeal after remand 761 F.2d 525 (9th Cir. 1985).

> Generally, an appearance in an action involves some presentation or submission to the court. [citation omitted]. An appearance may result from the filing of an answer without raising jurisdictional defects. An appearance may also arise by implication "from a defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting only the jurisdiction or by reason of some act or proceedings recognizing the case as in court. 6 C.J.S. Appearances Section 18 at 22 (1975). [citation omitted].

Cactus Pipe & Supply v. M/V Montmarte, 76 F.2d 1103, 1108 (5th Cir. 1985). On December 11, 1985, Rose filed a Rule 60(b) motion in the Colorado district court to set aside the default judgment entered by that court one year earlier. In that motion, Rose only challenged the punitive damage award against him. (He

later withdrew his confession of liability to compensatory damages and now contests that too). Rose informed the Colorado court that he was challenging the jurisdiction of that court to this court, but he did not raise any jurisdictional challenges before the Colorado court itself. We find that Rose's actions constituted a voluntary general appearance before the Colorado district court vesting it with personal jurisdiction.

Furthermore Rose waived the defect of lack of personal jurisdiction by appearing generally without first challenging the service of process problem in a preliminary motion or responsive pleading before the Colorado district court. Jackson, 682 F.2d at 1347; Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) opinion amended in 807 F.2d 1514 (1987) (general appearance by defendant failing to dispute personal

jurisdiction waives any defect in service or personal jurisdiction); Fed. R. Civ. P. 12(h)(1). Therefore, Rose has waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service.

Rose's argument that he has not waived his jurisdictional challenge because he raised and maintained his jurisdictional challenge in the California district court and now in this court on appeal is unpersuasive and the cases to which he cites for support are inapposite. See Chase v. Pan-Pacific Broadcasting, Inc., 750 F.2d 131 (D.C. Cir. 1984); Fahey v. O'Melveny & Myers, 200 F.2d 420, 451 n.9 (9th Cir. 1952); Orange Theatre Corp. v. Rayherstz Amusement corp., 139 F.2d 871, 874 (3d Cir.), cert. denied, 322 U.S. 740 (1944). These cases held that a defendant does not waive his

jurisdictional defenses if he meshes them with defenses on the merits. Furthermore, in each of these cases, the defendant objected to the jurisdictional defect in a pre-answer motion or in the answer itself before the court in which he was appearing. In the case at bar, Rose did not raise a jurisdictional defense in the Colorado court.

The district court's order of July 15, 1985, upholding the validity of the default judgment and finding Rose in contempt is VACATED. The consolidated appeals before this court are DISMISSED as moot. The parties may now pursue this case before the Colorado district court which now has jurisdiction over the parties and may address the issues on the merits.

APPENDIX B

8/28/86 United States District Court Order Denying Rose's Motions Under Rule 60

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-M-2163

[File-Stamped] APR 28 1986

SUSAN THERESE FULTZ, a/k/a
SUSAN FULTZ-SMALL,

Plaintiff,

v.

MASON H. ROSE, V.; H. L. QUIST, and
H. L. QUIST DEVELOPMENT CORP.,

Defendants.

ORDER DENYING ROSE'S MOTIONS
UNDER RULE 60

This court entered a default judgment in this matter on December 11, 1984, as against the defendant Mason H. Rose, V., and further ordered that the judgment be entered as a final judgment under F.R.Civ.P. 54(b). On December 11, 1985, the defendant Rose filed

"Defendant Rose's Motion for Relief From Default Judgment, By Reason of Mistake And Misrepresentation [FRCP 60(b)(1) and 60(b)(3)], And By Reason Of Clerical Mistake [FRCP 60(a)]," with a supporting brief and affidavit of Mason H. Rose, V. The plaintiff filed a response on December 23, 1985, although this court did not order a response to be filed. In that response, the plaintiff seeks attorney's fees for its filing. Some additional papers have now been filed by both parties.

After careful consideration of the Rose motions, filed December 11, 1985, this court finds and concludes that there is no showing of any basis for relief under Rule 60. What is shown is that having elected not to appear and defend in this civil action, and having chosen the tactic of attacking this court's judgment in California where the plaintiff has sought to recover on the

judgment, and having failed in doing so, the defendant Mason H. Rose, V. now seeks belatedly to carry on this litigation at this late date. The defendant was given every opportunity to appear and defend in this case, due process was provided, and there was no factual or clerical error in this court's findings and judgment.

The plaintiff was not required to file a response to the Rule 60 motions, and this court will not prolong this matter by further proceedings directed to the attempt to recover attorneys' fees for a volunteered response.

Upon the foregoing, it is

ORDERED, that the defendant Rose's motions, filed December 11, 1985, are denied.

Dated: April 28, 1986

BY THE CO

/s/Richa
Judge

UNITED STATES

TENTH CIRCUIT

United States Court of Appeals
Order and Judgment

[File Stamped] MAY 10 1988

No. 86-1779
(D.C. No. Civil 83-M-2163)
(D. Colo.)

SUSAN T. FULTZ,

Plaintiff-Appellee,

v.

MASON H. ROSE, V.,

Defendant

Before M
Circuit J.

Upon consideration of all the issues raised in this case, we find that the district court did not abuse its discretion in granting the defendant's

B-5

Fed. R. Civ. P. Rule

All pending motions are denied and the judgment of the district court is affirmed.

AFFIRMED.

ENTERED FOR THE COURT

Deanell Reech Tacha
Circuit Judge

APPENDIX C

Excerpts from p. 15 of Rose's Opposition to Demurrer and Motion for Judgment on the Pleadings in the Trial Court (CT 337)

The Ninth Circuit order (Exhibit G) held that Rose waived improper service by appearing generally in Colorado a year after the default judgment, but it did not hold that the waiver was retroactive or that the jurisdictional issue was waived as to the judgment so as to ate it retroactively if it was void. If it had, that would have been a violation of due process. See In Re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50. We are not aware of any federal law on the subject, but both California and Colorado law forbid retroactive validation of a void judgment by a postjudgment general appearance. In re Marriage of Smith, supra, 135 Cal.App.3d 543 [general

appearance did not retroactively cure defective service]; Weaver Construction Co. v. District Court (Colo. 1976) 545 P.2d 1042, 1046 ["The general appearance subjected Robert Grinnell only to the jurisdiction of the court from the date of the appearance, and is not retroactive so as to ate the void judgment."].

Excerpts from pp. 18-19 of Rose's Opposition to Demurrer and Motion for Judgment on the Pleadings in the Trial Court (CT 340-41)

Why then was the district court's order vacated nonretroactively? The answer lies in the emphasized words of the last sentence of Exhibit I: "Vacation of the March 7 order shall not operate retroactively and shall have no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order." (Emphasis added.)

Those words must have been intended to mean what they say, that vacation shall have no legal effect on those actions. That means no legal effect either way; Rose cannot claim the sale was in simply because the sale order was vacated, but conversely defendants cannot claim that the sale was simply because the vacation was nonretroactive.

Any other interpretation would

violate Munsingwear, contradict the Ninth Circuit's express reliance on that case, and deny due process to Rose. Furthermore, it would lead to an absurd result: If the Ninth Circuit could not decide Rose's rights because Hawkins was not present, then a fortiori they could not decide the rights of Hawkins (and Fultz) for the same reason. Yet that is what Hawkins and Fultz ask this Court to rule.

Excerpts from pp. 19 and 20 of Rose's Opening Appellate Brief in the California Court of Appeals

Finally, we asserted (CT. 341) that any other interpretation would deny due process to Rose. Whether or not the appellate court vacates the order appealed from when the appeal is mooted, the denial of the right to appeal (unless it is the choice of the plaintiff not to appeal) also denies a full and fair hearing on the issues of the appeal.

California courts recognize that "Collateral estoppel may be applied only if due process requirements are satisfied. The party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time." Mueller v. J.C. Penney Co. (1985) 173 Cal.App. 3d 713, 720; citations omitted.

We are not aware of any California cases on the effect of the lack of a

right to appeal on that fair opportunity, but that problem is the first of several examples given by section 28 of the Restatement (Second) of Judgments, which provides as follows:

> "Sec. 28. Exceptions to the General Rule of Issue Preclusion
>
> "Although an issue is actually litigated and determined by a and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> "(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action;"

Excerpt from p.21 of Rose's Reply Brief in the California Court of Appeals

California law is the same. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, discussing the deprivation of due process inherent in a contrary rule. Based on that discussion, and the facts of this case, Rose contends that a determination of retroactive validation would be a violation of due process.

Excerpts from pp. 13-14 of Rose's Petition for Rehearing in the California Court of Appeal

There was no such determination, and no mention of jurisdiction, in the Colorado court's 1986 denial of Rose's rule 60 motion, or in the Tenth Circuits order on the appeal from that denial. Where the defendant does not appear, he is "free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. (Ins. Corp.of Ireland, supra, 450 U.S. at 701). His right to do so is a constitutional right under the Due Process Clause. (Id., 450 U.S. at 702). Furthermore, if a federal judgment is void, it "is a legal nullity and may be collaterally attacked at any time," "in any proceeding wherein the ity of the judgment is appropriately challenged." (7 Moore &

Lucas, Moore's Federal Practice (2d ed. 1990) Para. 60.41[2] at p. 60-417.) That attack on a void federal judgment may be made in a state court. (Ibid.)

28. Rose's postjudgment general appearance in Colorado could not constitutionally ate the void default judgment, and the applicable law of both states involved here (Colorado and California) holds that it does not. We are not aware of any separate federal law on that question (neither the case cited by this Court [Slip. Op. at 8], nor any case cited by that case, involved a postjudgment general appearance. However, the Colorado case relied on by Fultz, in her successful motion to dismiss Rose's appeal as moot, expressly held that a judgment void for lack of service was not retroactively validated by a later general appearance. (Weaver Const.Co. v. District Court

(Colo. 1976) 545 P.2d 1042, 1046.) California law is the same. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, holds that a general appearance did not retroactively cure defective service, and discusses the deprivation of due process inherent in a contrary rule. We raised that due process issue below, at the first opportunity (CT 337), and again in this court, in Rose's Reply Brief (at 21). We raise it again here; interpreting the June 1987 Ninth Circuit Memorandum to retroactively ate the default judgement would be a violation of Rose's rights under the respective Due Process Clauses of both the United States and California Constitutions.

Excerpt from p.21 of Rose's Petition for Review in the California Supreme Court

3. A holding of retroactive waiver violates due process.

California law is the same as that of Colorado, by statute. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, holds that a general appearance did not retroactively cure defective service, and discusses the deprivation of due process inherent in a contrary rule (135 Cal.App. 3d) at 549-50; footnotes omitted:

> "[H]ere we are--as fine an example as possible of the quotation above concerning metaphors and how unreflecting use of legal concepts leads to unintended results. The rule began as an aid to justice and became one of automatic application, a trap for attorneys who find it difficult to predict safely what the next judge will call a 'general appearance,' depriving unwary defendants of '"The fundamental requisite of due process of law. . .the opportunity to be heard."'"

Rose raised that due process issue

below, at the first opportunity (RT 337), and again in the Court of Appeal, in his Reply Brief (at 21) and his Petition for Rehearing (at 13-14). He raises it again here; interpreting the June 1987 Ninth Circuit Memorandum to retroactively ate the det[illegible] is a violation of Rose[illegible] the respective Due Process clauses of both the United States and California Constitutions.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued and Submitted
November 6, 1987 - Pasadena, California

Filed December 11, 1987

Before: Arthur L. Alarcon, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

COUNSEL

James A. Beckwith, Wheat Ridge, Colorado, for the plaintiff-appellee.

[illegible] Weinberg, Los Angeles, [illegible] the defendant-appellant.

ORDER

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In accordance with the Supreme Court's guidance in United States v. Munsingwear, 340 U.S. 36, 29 (1950), we dismiss this appeal and vacate the district court's order entered March 7, 1986. Vacation of the March 7 order shall not operate retroactively and shall have no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order.

No. 91-1020

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MASON H. ROSE,

Petitioner,

vs.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A.,

Respondents.

REPLY BRIEF

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(310) 450-5687

Counsel of Record
For Petitioner

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NEW QUESTION RAISED BY RESPONSE

Respondents have unwittingly raised an additional question that is worthy of review by this Court. Their Question Presented No. 2a (Response, p. xi) asks if "the California state court's application of California law relating to collateral estoppel give[s] rise to a federal question within the purview of this Court?"

The answer to that question is easy, and was provided by this Court more than 50 years ago in Toucey v. N. Y. Life Ins. Co., 314 U.S. 118, 129 n. 1 (1941): "Pleading a federal decree as res judicata in a state suit raises a federal question reviewable in this Court . . . ."

Despite that easy answer to Respondent's question, it raises an obvious follow-up question that has not yet been answered by this Court but should be, as to whether it was proper for the California Court to apply California law to a

plea of collateral estoppel by a federal decree. Restating that follow-up question as our own Question Presented No. 3, it is this:

> 3. May a state court apply its own state law of collateral estoppel, to give preclusive effect to a prior federal judgment or decree on a matter of federal law, where the prior federal ruling would not have preclusive effect under federal law?

This Court long ago established that a state court cannot give a federal decree less preclusive effect than it would have under federal law. Stoll v. Gottlieb, 305 U.S. 165, 170-71 (1938). It should now rule on whether a state court can give a federal decree more preclusive effect than it would have under federal law.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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REPLY BRIEF

This brief is the reply of Petitioner MASON H. ROSE ("Rose") to the Response to his Petition for Certiorari, filed by Respondents ROGER E. HAWKINS, CHRISTA M. HAWKINS and HOME SAVINGS OF AMERICA, F.A. (collectively "Respondents"). The other respondent, SUSAN T. FULTZ, did not file a response.

REPLY ARGUMENT

Respondents' argument is almost entirely devoted to contentions that certiorari should not be granted for procedural reasons. They include a contention that Rose

did not adequately raise federal questions in the state courts, three contentions that there were separate and independent non-federal grounds for the rulings of the California Courts, and even a contention that Rose did not properly set forth the grounds for this Court's jurisdiction. None of those contentions has merit.

A. Due process and other federal issues were adequately raised below. Rose's jurisdictional challenge to the federal judgment, and Respondents' defense of collateral estoppel by federal rulings, raised federal questions, and Rose so stated below.

First, the Response (pp. 8-15) argues that Rose's due process issues were not adequately raised below, falsely asserting there was no discussion of applicable constitutional provisions, or any cases which interpret them. On the contrary, in the trial court alone, Rose's brief quoted Moore's Federal Practice four times (CT, pp. 326, 335, 338, 339), and cited three decisions of this Court a total of six

times (CT, pp. 325, 336-39, 343); Rose provided the court with full copies of each of those cases (CT, pp. 264-98).

Rose quoted (CT, p. 336) a statement from one of those cases [Ins. Corp. of Ireland v. Compagnie des Bauxites, 450 U.S. 697, 702 (1982)] that the requirement of personal jurisdiction "flows . . . from the Due Process Clause . . . and protects an individual liberty interest." That quotation was followed by a statement (CT, p. 336) that "It is that right to due process, under the constitutions of the United States and California, that Rose seeks to assert here." (Emphasis added.)

Thus Rose's jurisdictional challenge to the Colorado default judgment raised a federal question, under the Due Process Clause of the U.S. Constitution, and he said so, to the California trial court.

Further, Respondents' defense of collateral estoppel, based on rulings of the

federal courts, raised federal questions, and Rose so advised the California Court of Appeal in his Opening Brief (at p. 16), not first in a petition for rehearing, as follows:

> "Incidentally, if there were a difference between California and federal law on a collateral estoppel question (as there is not on this one), federal law would control, because all of the rulings asserted as collateral estoppel here were rulings of federal courts."

B. The California court's application of its own state law of collateral estoppel to a federal judgment "raises a federal question reviewable in this Court." That is a new Question Presented, worthy of review here.

As one of its contentions that there were independent state grounds for the California judgment, the Response (pp. 17-20) argues that its determination that Rose is collaterally estopped was made under state law and precludes review here.

But this Court long ago ruled that

"Pleading a federal decree as res judicata in a state suit raises a federal question reviewable in this Court . . . ." Toucey v. N. Y. Life Ins. Co., 314 U.S. 118, 129 n. 1 (1941). "The Supreme Court has consistently adhered to the proposition that it has jurisdiction to review state decisions that deal with the res judicata effects of federal judgments." 18 Wright, Miller & Cooper, Federal Practice and Procedure (1981), Jurisdiction sec. 4468, p. 651.

Since the rulings asserted as collateral estoppel here were all federal, under Toucey pleading those rulings as preclusive raised a federal question that can be reviewed here. Furthermore, it raises important questions that should be reviewed here, as to whether it was proper for the California Court of Appeal to apply its own state law of collateral estoppel to those federal rulings. Rose submits that

it was not, and he has stated this new Question Presented No. 3, immediately following the front cover of this brief:

> 3. May a state court apply its own state law of collateral estoppel, to give preclusive effect to a prior federal judgment or decree on a matter of federal law, where the prior federal ruling would not have preclusive effect under federal law?

Our petition for certiorari (pp. 35-38) showed that the California Court of Appeal applied an aberrant definition of "actually litigated" which changed the result. That definition was taken from a published California case that conflicts with the federal law established over a century ago in Cromwell v. County of Sac, 94 U.S. 351, 353 (1877). We cited and quoted Cromwell, in our Opening Brief in the California Court of Appeal (at p. 15).

Our petition for certiorari (p. 37)

further showed that California's use of that aberrant definition would prevent any jurisdictional attack on a default judgment, "because (expressed or not) any judgment necessarily decides that the court had jurisdiction to render it." See Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938) ["Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."]

Here the rulings asserted as collateral estoppel were not only made by federal courts; they also were made under federal law, relating to jurisdiction of the federal court, and the mooting of federal appeals. It is therefore particularly appropriate that the preclusive effect of those rulings be determined under federal law.

According to 1B Moore's Federal Practice (1991), Para. 0.406[1] at p. 272

(emphasis added; footnotes omitted):

> "Under [28 U.S.C.] section 1738, it is the res judicata principles of the jurisdiction rendering the judgment that are to be applied, not the res judicata principles followed by the polity the laws of which govern the substantive issues. It follows that the preclusive effect of a state court judgment, though based on federal law, is measured by state law, and conversely, the preclusive effect of a federal judgment in a diversity case is governed by federal law.

But none of the cases cited by Moore for that emphasized proposition involves a state court's giving more preclusive effect to a federal judgment than a federal court would. That is the question here; only this Court can decide that question, and it is worthy of decision in this case.

c. California law does not and cannot prevent collateral attack on a federal judgment or order that is void for lack of jurisdiction.

As a second contention that there were independent state grounds for the California judgment, the Response (pp. 20-22) argues that the determination, that Rose's claims were an improper collateral attack on the prior federal judgment, is an independent state ground that precludes review here.

This argument fares no better than the first. A state has no more right to apply it own law to determine whether a claim is an improper collateral attack than whether that claim is collaterally estopped.

Here our jurisdictional claims are indeed collateral attacks on the Colorado default judgment, and such attacks have been expressly authorized by this Court. According to Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 697, 701 (quoted in our trial court brief at CT, p.

336, and in our Court of Appeal Opening Brief, p. 18)"

> "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."

Neither the California Court of Appeal opinion nor the case it cites rejects our jurisdictional claims as an improper collateral attack on the federal rulings. Our jurisdictional claims are rejected (at Rose Appendix, p. A 12) solely on grounds of collateral estoppel ["Collateral estoppel bar's Rose's action . . . ."]."

The California opinion is obviously rejecting only our nonjurisdictional claims when it states (in another section, section B (Rose Appendix, p. A 13; emphasis added): "<u>If a court has jurisdiction over the subject matter and parties</u>, the order or final judgment is not subject to col-

lateral attack in a later proceeding, regardless of whether it is contrary to statute or otherwise erroneous."

As for our nonjurisdictional claims, federal law must determine whether those claims are collateral attacks on federal court rulings, and if so whether or not they are proper. Rose contends that those claims are not improper, because they are based on a federal court order (for the sale of his home) that Rose could not appeal because the Ninth Circuit dismissed his appeal from it. That is the second of the two questions raised by his petition for certiorari. It too is worthy of decision by this Court here.

D. The fact that the trial court ruling was on demurrer, for failure to state a cause of action, does not insulate it from review by this Court.

As a third contention that there were independent state grounds for the California judgment, the Response (pp. 22-24) argues that the sustaining of the demurrer

for failure to state a cause of action was an independent state ground that precludes review here.

But that part of the trial court's judgment (Rose Appendix, p. A 19, quoted at Response, p. 23) finds that Rose "is unable to further amend his pleadings to state a valid cause of action against [Respondents]. This is because the facts provided by Plaintiff Rose clearly show that the subject property was purchased by the Hawkins and financed by Home, respectively, pursuant to a valid Court Order expressly authorizing the purchase." (Emphasis added.)

Thus the only basis for sustaining the demurrer without leave to amend was the validity of the federal court order for the sale of the home. We do not quarrel with the finding that we could not amend to assert the claims we raise here if the federal court order was valid. But, as

shown in previous sections of this reply, the validity of the federal court order, as well as the choice of law for making that determination, are federal questions; they do not and cannot provide an independent state ground that would preclude review by this Court.

Long ago, this court rejected a contention similar to Respondent's here, in Kalb v. Feuerstein, 308 U.S. 433 (1940). There (as here) a state court sustained demurrers for failure to state a cause of action, against purchasers at a sheriff's (here marshal's) sale (308 U.S. at 436-37). There (as here), the purchasers asserted "Independent and adequate non-federal grounds" supporting the state court decision (arguments of counsel, 308 U.S. at 434).

In Kalb, this Court properly rejected that contention, because federal law ousted the state court of jurisdiction in

a bankruptcy matter (308 U.S. at 437-38). Here Rose raises jurisdictional claims and other claims under federal law, relating to the validity of a federal judgment. The result should be the same as in Kalb.

E. This Court has jurisdiction to review this final judgment of "the highest court of a State in which a decision could be had," where rights are "claimed under the Constitution or statutes of the . . . United States."

As its last procedural contention, the Response (pp. 24-26) argues that the petition should be denied for failure to set forth the basis for jurisdiction. Respondents complain that we did not identify the portion [of 28 U.S.C. sec. 1257] we rely on.

It should be obvious that we were invoking this Court's jurisdiction to review final determinations of state courts on federal questions, which is authorized by the language quoted in the above heading.

The case cited in the Response (pp. 25-

26) would not justify denying the petition on a technicality, as Respondents request here. There, in Gorman v. Washington University, 316 U.S. 98, 101, there was not just a technical failure to identify the relevant portion of this section; the petitioner did not establish that the state court decision was by the "highest court . . . in which a decision could be had."

Here, by contrast, we showed that this requirement was satisfied (attaching copies of state court rulings at all levels), and it was obvious that we raised federal questions arising from the prior rulings of federal courts. There is no question of jurisdiction (of this Court) here.

F. Respondents' brief discussion of the merits is not responsive.

The response (pp. 26-29) gives short shrift to the merits. It does not respond

to our argument of the merits in the petition, but merely echoes the rulings below, which the petition has already addressed. Accordingly, we stand on our merits arguments in the petition and will not repeat them here.

CONCLUSION

Certiorari should be granted, so this Court can review the new Question Presented No. 3 (raised by the Response and discussed in this reply), as well as the two questions identified in the petition.

Respectfully submitted,

JAMES M. WEINBERG
Attorney for Petitioner
MASON H. ROSE